They are not. They have been the grounds on which most cases have been decided. Despite all the debate about the fitness to teach of the *avowed* Communist, that issue, ironically, is indeed an academic one. So far as I know, there has not been such a case since the day back in 1948 when Professors Phillips and Butterworth acknowledged their Party membership to their colleagues at the University of Washington.

It is more than ironic, it is tragic for the cause of academic freedom, that a brave new ideal has suffered so much for the assumed faults of so few. Except in isolated instances like the New York city colleges in the 1930's, Communists never were significant in American academic life. Now, I am confident, they have practically disappeared. But the damage has been done; and it will take many MacIvers and much goodwill before the bloom is restored.

RALPH S. BROWN, JR.†

NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955. By Fred Rodell. New York: Random House, 1955. Pp. xii, 338. $5.00.

PROFESSOR Rodell's book describes and appraises the powerful part the Justices of the Supreme Court play in our government. In the foreword he warns his readers that his appraisals will be influenced by prejudices based on his "ideas and ideals"—which he identifies as those of "that great and unlike group that is fuzzily labeled 'liberal' . . . or lookers-after-the-other-fellow."[1] He hopes that his evaluations of the Justices he has known *are* based on his ideals rather than "petty, personal things," and it is in this light that Holmes is one of his "major heroes," McReynolds one of his "near villains," and Douglas "rated in this book considerably above Justice Frankfurter."[2] He will try to "give the devils their more than due" and at the same time stick to his most important ideal or prejudice—an "almost fanatical devotion to personal integrity that combines intellectual honesty, with courage."[3] He will exclude all matters of interest only to lawyers and will try to write "so that any halfway literate non-lawyer can understand."[4]

The power of the Court is the power of the majority of the Justices, and their power, Rodell maintains, is "unique," "autocratic" and "irresponsible."[5] Their decisions can override Congress, the President, state legislatures, and all lesser national, state and local officials. Checks on their power provided in the Constitution are too limited and slow-moving to have much effect. Only once in

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1. Pp. xi-xii.
2. P. xi.
3. P. xii.
4. P. ix.
5. Pp. 32-33.

this century has the Senate rejected a presidential nomination for the Court; no Justice has ever been removed by impeachment; and the cumbersome procedure for amending the Constitution has seldom been used to change the effect of a Court decision. The Court is the only department of our government that conducts its major deliberations in utter secrecy, and that never reports on its secret deliberations. The Justices can, moreover, exercise their power evasively, and thereby the more autocratically. After hearing a case they can refuse to decide an issue by calling it "political" and therefore beyond their power. Yet in other cases they do decide political questions—for instance, whether the tidelands oil is owned by the states or the nation. And they may refuse to hear a case without giving any reason for their refusal, even though the refusal may have the same consequences as an actual decision in the case. Rodell disputes the dictum that "all that a denial of a petition for a writ of certiorari means is that fewer than four members thought it should be granted";[6] it means, he says, much more. It is in effect a full and, in the great majority of instances, a silent affirmation of the lower courts' decisions: a man convicted of perjury would have to serve his prison sentence and a man convicted of first-degree murder might be hanged, despite their appeals for hearings before the Supreme Court —which gave no reasons for its refusal to review their cases.

So Rodell regards the Supreme Court Justices as "the most powerful and the most irresponsible . . . men in the world"[7]—who exercise their immense power, moreover, not as judicial men who know or find the law, but as "highly human and hence inevitably political men."[8] A lawyer who has spent his professional life serving business clients cannot as a Justice forget his prejudices in favor of such clients; and a lawyer who has devoted his public activities to advancing liberal measures cannot suddenly become impartial in passing on the constitutionality of such measures.[9]

Considering the question of the origin of this "indubitable" power of the Justices, Rodell says that the answer is not so "black-or-white simple, nor yet so difficult, nor even so important, as the scholarly squabbles of historians and political scientists would sometimes make it seem."[10] To explode "misconceptions about what the Court should be today, based on misconceptions about what it was at its birth," and to dispel "illusions about the Court being any other than an essentially political body, . . . so intended, from its very creation," Rodell enters the squabble long enough to establish his own black-and-white, and presumably important, conclusion: the "Court's political power was conceived, if furtively, during the drafting of the Constitution; . . . carefully nourished prenatally by the Federalist Party during the early years of the nation's life while that party controlled the entire federal government: . . . skillfully and timely midwived by Chief Justice Marshall soon after the Federalists

6. Pp. 16-17.
7. P. 4.
8. P. 9.
9. Pp. 28-29.
10. Pp. 33-34.

had lost the Congress and the Presidency."[11] Rodell sketches the lives of the Justices who served before Marshall (who was appointed in 1801) in order to show that most of them were "mediocre" lawyers or judges, selected by Washington and Adams for their political views rather than for their particular talents as expert, impartial interpreters of the Constitution and the statutes of Congress. They were there, as the historian J. Allen Smith observed, to help make the national government "an adequate bulwark of conservatism."[12] The bulk of Rodell's book consists of descriptions of the gradual growth of the Court's political power, from the time of Marshall, "the Great Chief Justice," to that of Warren—who, Rodell believes, may come close "to resembling a might-be twentieth-century Marshall."[13]

Rodell calls *Marbury v. Madison* "the most important decision in all Supreme Court history."[14] He describes Marshall's adroitness in bringing into a single controversy over a minute issue (whether the Court should order President Jefferson's Secretary of State to deliver to one of ex-President Adams' minor "midnight" appointees his commission of appointment) a series of holdings serving Marshall's over-all political intentions. Marshall held that Madison was legally obligated to deliver the commission, that a petition for mandamus was the proper remedy, and that the Secretary of State was not too high an official to be mandamused—but that Congress had acted invalidly in conferring on the Supreme Court original jurisdiction beyond that specified in the Constitution. Then, having rebuked President Jefferson's Secretary of State and yet successfully avoided a hopeless fight with Jefferson (an arch political enemy who probably would have refused to turn over the commission, mandamus or no), Marshall proceeded, through an analysis of the meanings and logical implications of the words of the Constitution, to prove that the framers clearly meant to give to the federal courts the right and obligation to invalidate congressional acts that the courts deemed inconsistent with the words of the Constitution. In later cases Marshall made political use of this power: by interpreting such words as "regulate," "commerce," "among the several states," "obligation of contracts" and "necessary and proper," he sustained congressional statutes benefiting the propertied groups favored by his party, and nullified state statutes favorable to the interests of smaller-propertied groups.

In the middle section of his book,[15] Rodell considers, period by period, the varying constitutional interpretations set forth by the Court during the century from Taney's Court to the early years of Hughes' Chief-Justiceship. He explains these variations in terms of the biases of changing Court majorities. For Taney's Court, Rodell notes the shift in the Court's interest from the "banker-investor-merchant" group of the North and East to the farmer groups of the

11. P. 34.
12. P. 41.
13. P. 331.
14. P. 86.
15. Cc. 4-6.

South and West.[16] Although Taney's slaveholding-plantation bias made him uphold the fugitive slave law and deny Dred Scott his freedom, some of his decisions protected the interests of small farmers; and Taney "struck a brave blow for individual liberties" when he ruled, during the Civil War, that only Congress, not the President, could suspend the writ of habeas corpus.[17]

In analyzing the Court's record from the end of the Civil War through the 1920's, Rodell gives chief attention to the conflicts between pro-business, or illiberal, Justices and pro-labor and -farmer, or liberal, Justices, with the former winning most of the battles. Most notable of the dominant element's achievements was the Court's engrafting onto the Fifth and Fourteenth Amendment due process clauses of a prohibition of legislation (by either Congress or the states) deemed by the Court to be unreasonable regulation of private business. Rodell gives due praise to the famous dissents by Holmes and Brandeis in such cases. He deplores, however, what he regards as a fateful liberal-supported blunder in this period—the Court's adoption (in cases under the Espionage and Sedition acts of World War I) of the Holmes-Brandeis "clear-and-present-danger" test for the validity of legislation limiting freedom of speech. He calls this formula Holmes' "greatest, and only major, judicial error," leading less liberal and less intelligent Justices into "diluting the strong, straight stuff of the First Amendment, with its absolute ban on congressional meddling with freedom of speech."[18]

Rodell's complaints become fierier as he reviews the Court's record during the two decades before Warren's appointment as Chief Justice in 1953. He considers the Hughes Court's attempts, in 1935 and 1936, to defeat the New Deal, and the same Court's surrender in early 1937; the vacillation and discord in the "New Deal Court" between 1939 and 1949; and the "shameful" record of the "Vinson [or Truman] Court" in its "judicial disregard of most personal freedoms."[19]

Rodell calls the Court's fight against the New Deal "the most famous and exciting short-span period" in the history of the Court.[20] In two years the "judicial guardians of property" (Van Devanter, McReynolds, Sutherland and Butler) joined by two more intelligent and independent conservatives (Hughes and Roberts) invalidated over a dozen congressional and state statutes controlling private economic activities, yet the same Court seemed indifferent to various governmental encroachments on civil liberties. There are differences of opinion as to what caused the Court's sudden change in January 1937. Some believe that the unprecedented popular majority in the 1936 election persuaded Hughes and Roberts to make their famous switch—the Justices following the election returns, as Justices have done before and since. Rodell prefers a more robust explanation—that it was the President's threat to reform (or pack) the

16. P. 114.
17. P. 136.
18. P. 210.
19. P. 306.
20. P. 213.

Court that forced the switch. He says that "for all the forensics and falderol, political pressure would have pushed the plan through had not Hughes proved the most astute statesman of them all."[21] He does admit, however, as a possible explanation the one to which many observers subscribe—that the pressure of public opinion, as revealed in both the election returns and the widespread congressional and newspaper criticism, was sufficient to cause the Court's switch. Some observers believe the same force accounted for defeat of the President's bill in Congress. "The Court Reorganization Bill of 1937," John Lord O'Brian said recently, "was defeated because of the moral resentment expressed by the great mass of people whose sense of fair play was outraged by the proposal."[22]

With Roosevelt's fifth appointment (Murphy succeeding Butler in 1939) the Court became a "pro-New Deal" Court and remained that until the deaths of Murphy and Rutledge in 1949. The Roosevelt Justices, when they were a minority, had maintained a tight unity of dissenting "black-and-white" convictions. As a majority they were unable to control or conceal their "intellectual disharmony."[23] The result was a mixture of right and wrong decisions, with strange cross-switches between liberal and illiberal Justices. On religious freedom this Court's record was prevailingly good: in more than a score of decisions it protected the right of a small religious sect (Jehovah's Witnesses) to spread their propaganda on the streets without having to buy the licenses that various states or cities tried to require of them; and it restored to conscientious objectors among resident aliens their right to become naturalized citizens. Rodell finds no significant gain for freedom of speech in this Court's record: he notes that the Court properly protected that freedom in upholding the right of newspapers to criticize a judge's behavior in conducting a trial, but that it wavered between right and wrong decisions on the rights of working men in peaceful picketing. He believes the Court was at its worst in its decisions supporting the wholesale evacuation and confinement of West-coast Japanese-American citizens of "proved loyalty."[24] And he finds the Court at its best, making perhaps "its most enduring contributions to public law,"[25] in its many decisions establishing various rights for Negroes: voting rights in elections and primaries; equal seating rights on interstate busses; and full benefit of the constitutional guaranties of fair trials in the criminal courts (assistance of counsel, fairly selected juries, and protection from "third-degree" methods of extorting confessions).

What Rodell calls the "Vinson Court" began in 1949, when Truman added Clark and Minton (succeeding Murphy and Rutledge) to his two earlier appointees (Burton and Vinson), and ended with Vinson's death in 1953. Since three of the surviving Roosevelt appointees—Reed, Frankfurter and Jackson—

21. P. 248.
22. O'BRIAN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 82 (1955).
23. Pp. 257-58.
24. P. 296.
25. P. 294.

frequently sided with the Truman Justices on important cases, there remained on this Court only two reliable liberals—Black and Douglas. Rodell considers the Vinson Court's record extremely bad. He credits this Court with one outstandingly liberal performance—its decision ordering Southern state universities to admit qualified Negroes to their professional and graduate schools where equal opportunities for such training were not provided in the states' segregated schools for Negroes. For the rest, he generally has praise only for the dissenters, finding the majority decisions almost wholly wrong: upholding the imprisonment of an inflammatory speaker where the threat of violence came from the audience rather than from the speaker; upholding convictions obtained through the use of coerced confessions; and a "spend-thrift use" of the power to refuse to hear appeals in important cases involving questions of trial fairness.[26] His bitterest criticism is directed against the decision upholding the Smith Act conviction of the eleven Communist officials, a decision which, he says, was "the biggest blot on the Vinson Court's blot-marked ledger,"[27] for it all but abolished the free speech guarantee of the First Amendment. His final appraisal of Vinson and his Court is as follows: "For all his undoubted patriotism, chauvinist style, Vinson, less than any other man who ever headed the Court . . . understood the real meaning of American democracy";[28] his Court—except in the Negro cases—"while purporting to fight a foreign tyranny, actually aped it."[29]

Rodell finds some "harbingers of hope" in the record and personnel of the "Warren Court." Warren himself had made a good liberal record as Governor of California—raising old age pensions, urging the enactment of compulsory medical insurance and appointing the first Negro to a judgeship in a state superior trial court. Rodell also finds some balance of good in the newest Associate Justice. Past success as a "Wall Street lawyer," and some of his other business associations, may make Harlan "pro-business" and "pro-State" on questions of governmental regulation of business. Yet in his brief service as a judge on the Court of Appeals for the Second Circuit he showed concern for fair treatment of defendants; and as special counsel for New York City's Board of Education he supported the effort to bring "unconforming" Bertrand Russell to the City College faculty. Thus Harlan may help "turn the tables the other way" on civil liberties.[30]

However, the record of the first term of the Warren Court is in Rodell's eyes only halfway good. The Court's flat outlawing of segregation in the public schools was its "one major, and clearly historic, move," and its unanimity in deciding that traditionally divisive issue is a tribute to Warren's "executive

26. Pp. 314-15.
27. Pp. 320-21.
28. P. 309.
29. P. 304. For detailed accounts of the civil liberties attitudes of the "Roosevelt" and "Vinson Courts," see PRITCHETT, THE ROOSEVELT COURT cc. v, vi, x (1948); PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT (1954).
30. P. 329.

skill and force."[31] And Rodell is pleased to note that Warren sided with Black and Douglas in half the close civil liberties cases. But he blames Warren and his Court for the decision upholding the congressional act that gave the tidelands oil back to the states. On the basis of the record so far Rodell makes this hopeful estimate of Warren's possible place in the history of the Supreme Court:

> "[W]here Marshall's achievement was to protect a weak nation, as a nation, from its people, Warren's opportunity is the precise opposite; it is to protect the people, as people, from their strong nation. Given the will and the good-will to do it, he can succeed."[32]

* * *

The idea that the Justices are active and important participants in the formulation of public policy and that in this function they are not, and should not regard themselves as being, mere legal technicians or impartial logicians, has long been familiar in the writing of historians and political scientists;[33] and has been recognized, somewhat later, by professors of law. Presidents and senators have urged that the policy-forming function of the Justices should be a determining consideration in the appointment of a Justice.[34] Professor Felix Frankfurter, writing in 1916, sought to demolish the popular myth that "the nine Justices embody pure reason . . . set apart from the concerns of the community."[35] "The Justices as individuals," Frankfurter said later, "with all their diversities of endowment, experience, and outlook, determine the Court's actions"; and history would have recorded "fewer explosive periods if, from the beginning, there had been a more continuous awareness of the role of the Court in the dynamic process of American society" and in "the interplay of . . . political and economic forces."[36]

In explaining the performances of the various Justices in their role as policy-makers Rodell's theme is that the record of the Justices "is quite incomprehensible except in the light of what they were like and how they got that way."[37] Thus we can better understand an antilabor or illiberal decision if we know that it was made by a Justice who was the son of rich parents, or who was "conventionally" educated (e.g., according to Rodell, at Yale College), or who had been a successful railroad attorney, or "top boss of a Republican State machine." And it helps us to understand a liberal decision if we know that it was made by a Justice who was the son of a "dirt-poor farmer," or who was self-educated or less conventionally educated, or who had earned moderate wealth as a lawyer for labor unions. "Idiosyncrasies" of the Justices also count: one sort of opinion

31. P. 326.
32. P. 331.
33. *Cf.* "Justices Without Halos," in PRITCHETT, THE ROOSEVELT COURT 14-22 (1948).
34. See preceding article, Paul, *Justice Black and Federal Taxation*, 65 YALE L.J. 495, 506-08 (1956).
35. FRANKFURTER, LAW AND POLITICS: OCCASIONAL PAPERS 108 (1939).
36. *Id.* at 61.
37. P. 264.

comes from a Justice who is "least intellectually gifted," or whose "intellectual home" is at Harvard, or who is characteristically "opportunist," and another sort from a Justice who is "forth-right," or "humanitarian," or a "passionate crusader for liberties." Rodell does not maintain this as an absolute rule; there are exceptions such as Holmes, a "Back-Bay Republican" rendering liberal decisions. Some of these observations seem relevant and useful; some seem repetitious or superfluous; and some clearly irrelevant—as when, in describing Justices whose judicial behavior Rodell prevailingly dislikes, he refers to the "perpetual bow-tie" worn by one, calls another "little," and another "frog-mouthed."

* * *

Rodell's vividly narrated political history of the Court from its beginning through the 1940's seems to be generally authentic history, and his appraisals are interesting and "provocative." As a historian appraising the past, he had an easier task than as a commentator weighing events and opinions of yesterday and today. To a considerable extent the historian's material has been selected, sorted and (somewhat varyingly) explained. The commentator on contemporary events may have neither time nor perspective for thorough study and accurate judgment. This makes reliable appraisals more difficult, even though it also makes it easier to proclaim assured judgments. This difficulty besets both an author and a reviewer commenting on the author's work, in dealing with such matters as the meaning of constitutional provisions and the rightness or wrongness of the several Justices' interpretations of them. An added difficulty, in dealing with the First Amendment, is presented by the varying, wavering interpretations that have been set forth by the various Justices, including Rodell's heroes as well as his villains. Rodell's treatment of the *Dennis* case,[38] upholding the first conviction of Communists under the Smith Act, illustrates the problem.

In discussing the *Dennis* case Rodell asserts that the Vinson Court—affirming convictions not for any act, but for "talking and writing . . . teaching and advocating Communism" "gave its . . . benediction . . . to a law that flatly violated the free-speech guarantee of the First Amendment."[39] Vinson was either "ignorant" or "intellectually dishonest," for he purported to, but did not, stick to Holmes' exception; there wasn't any danger, Rodell says, either clear or present.[40] Douglas, on the other hand, "hewed straight, in the Holmes-Brandeis tradition," calling free speech "the glory of our system of government . . . not [to] be sacrificed [without] . . . plain and objective proof of danger that . . . is imminent."[41] Rodell says nothing about the specific evidence presented in the case, as cited by either Douglas or Vinson, and nothing about the conditions of the time, as appraised by either of the Justices, that might make the specific teaching safe or dangerous.

38. Dennis v. United States, 341 U.S. 494 (1951).
39. P. 321.
40. *Ibid.*
41. P. 322.

Both Vinson and Douglas in their opinions in *Dennis* declared their devotion to the constitutional guarantee of free speech; and both specified exceptions to that guarantee. Douglas, noting that "the Constitution provides no exception,"[42] provided his own. He said: "If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from the public files, the planting of bombs, the art of street warfare, and the like, I should have no doubts. The freedom to speak is not absolute."[43] Both Justices agreed that the test for an exception depends not only on the words used, but also on the conditions commonly known to have existed at the time of the utterances. "Speech innocuous one year," Douglas said, "may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic."[44]

Where Vinson and Douglas differed was in their selection and appraisal of items both from the documents placed in evidence and from the existing foreign and domestic conditions of which they took judicial notice. Douglas found that the petitioners taught a creed of revolution "with the hope that some day it would be acted on";[45] but he also found that the conditions were highly unfavorable for the acceptance of such teachings.[46] He noted our strong democratic tradition, our high literacy rate, and our secure economic situation—no long bread lines, no unemployed walking the streets, the country "not in despair."[47] He noted that "the people understand Soviet Communism" and that "the wares" of these "miserable merchants of unwanted ideas . . . remain unsold."[48] He concluded that there was little likelihood that the Communists through their teachings could have gained enough adherents to form either an effective political party or a revolutionary group strong enough to make a dangerous attempt at overthrowing the government.[49] From the same documents and conditions Vinson found that the teachers used assumed names and held secret meetings, and that the party leaders kept their teachings consistently in accord with changes in policy by the Russian Communist Party and government. He took note of the inflammable world conditions in which we were heavily involved, and the repeated manifestations of Russian hostility to our country. He concluded that there was a clear likelihood that what the petitioners taught and advocated would bring on injurious attempts which, under the Holmes-Brandeis doctrine, we had the right to forestall.[50]

Douglas and Vinson might have cited more items than they did from the documentary evidence—showing that the petitioners taught such things as these:

42. Dennis v. United States, 341 U.S. 494, 590 (1951).
43. *Id.* at 581.
44. *Id.* at 585.
45. *Id.* at 582.
46. *Id.* at 588.
47. *Ibid.*
48. *Id.* at 589.
49. *Id.* at 590.
50. *Id.* at 510-11.

the function of party leaders is to teach "the theory and tactics of the international proletariat"; the tactics should include "parliamentary methods," but only scorn should be poured on those "pacific socialists" who put their main faith in such methods and who are afraid to use "illegal methods"; the leaders should engage in and urge others to engage in "illegal work"; "revolutionary slogans and resolutions" are worthless unless they are "backed by deeds"; the party should "establish alliances" with Communist parties in other countries—especially the Russian party; "the fires of revolution" should be "kindled in every country"; Communist parties everywhere should look to Russia as "the centre of attraction," the "mighty centre for workers in all countries," the "leader" and "the mother country of world revolution."[51]

Would Douglas say that there was no "common" or "judicial" knowledge that some of the Communists' "wares" *were* "sold," that documents had been filched and information illegally obtained for the benefit of Russia, and that—as Judge Learned Hand, no indifferent liberal, said in his opinion upholding the convictions [52]—Russia had overthrown several European governments, in support of local parties unable to maintain their Communist governments by their own unallied strength? How soon after speech teaching the filching of documents would an actual theft have to occur for Douglas to sustain a conviction for the teaching—about which he said he would "have no doubts"? How immediately did Holmes and Brandeis think that an obstruction of recruiting and enlistment would result from the Schenck pamphlet's wartime denunciation of the draft?

What is said above is not intended as an assured appraisal of either the Smith Act or the *Dennis* decision.[53] Rather it is an attempt to probe the extent of Douglas' "straight-line" conformity to the Holmes-Brandeis formula, for which he wins Rodell's praise; and it has relevance to a more general comment on Rodell's (and now Black's?)[54] renunciation of that formula.

Rodell says that it "is precisely in protecting the expression of all views, however extreme or unpopular and no matter how much it may hurt to protect them, that freedom of speech has a more than mushy meaning."[55] He says, or implies, that just that was what the framers and ratifiers of the First Amend-

51. See STALIN, FOUNDATIONS OF LENINISM, *passim* (rev. transl. 1932). Similar teachings can be found in other books listed by Douglas as evidence presented at the trial showing what was taught by the petitioners.

52. Dennis v. United States, 183 F.2d 201 (2d Cir. 1950).

53. Rodell—despite his fervent denunciations of the *Dennis* decision upholding the convictions of the Communist officials—says nothing at all about the first prosecution and convictions under the Smith Act. Officials of the Socialists Workers Party ("Trotskyites") had been convicted, in December 1941, for advocacy surely no more threatening than that later shown against the Communists. The Supreme Court three times refused hearings in the earlier case, without any protest by Black, Douglas, or any of the others. Dunne v. United States, 138 F.2d 137 (8th Cir.), *cert. denied*, 320 U.S. 790, *rehearings denied*, 320 U.S. 814, 815 (1943).

54. *Cf.* Dennis v. United States, 341 U.S. 494, 579 (1951) (dissenting opinion).

55. P. 208.

ment meant. He says: "The eighteenth-century revolutionaries who wrote the Constitution flatly banned, without one iota of qualification, any congressional law 'abridging freedom of speech.' "[56] There are more deviators—early and late, liberal and other—from Rodell's strong dogma than he seems to recognize. Eighteenth century revolutionaries put into their state constitutions "unqualified" statements that "freedom of the press" (their phrase for freedom of speech) "shall remain inviolable," "shall be inviolably preserved,"[57] and the like. Yet they, and their governmental successors, continued to maintain the traditional, generally assumed and accepted, limitations on speech—limitations that have been enforced in the courts without much serious suggestion from any quarter that the limitations violate the First Amendment.

In 1937 Brandeis suggested that the First Amendment's guarantee covered means of communication other than speech: it protected working men using their own means of publicity to "make known the facts of a labor dispute" in "a lawful form of appeal to the public."[58] Murphy spoke for a unanimous Court when, a few years later, he held valid a state statute forbidding a local proscription of peaceful picketing; and this principle has been followed in later decisions.[59] Yet Black, speaking for a unanimous Court in 1949, upheld an injunction against peaceful picketers who were trying to force an ice company to stop selling ice to non-union peddlers.[60] In this case Black, still treating peaceful picketing as protected by the constitutional guarantee of freedom of speech, explained his qualification of that freedom as follows:

> "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language either spoken, written, or printed. . . . Such an expansive interpretation of the constitutional guarantees of freedom of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society."[61]

Black later joined in opinions by Frankfurter and Minton upholding injunctions against peaceful picketing used for an improper purpose.[62]

The First Amendment is as unqualified in guaranteeing freedom of religion as in guaranteeing freedom of speech. Yet in 1942, Murphy—"humanitarian . . . passionate crusader for liberties for everyone everywhere"[63]—spoke for a

56. Pp. 208-09.

57. See the following early state Constitutions: S.C. CONST. § 43 (1778); N.H. CONST. § 22 (1784); GA. CONST. § 22 (1789), reproduced in F.N. THORPE, THE FEDERAL AND STATE CONSTITUTIONS (1910).

58. Senn v. Tile Layers Protective Union, 301 U.S. 468, 478, 481 (1937).

59. Thornhill v. Alabama, 310 U.S. 88 (1940).

60. Giboney v. Empire Storage Co., 336 U.S. 490 (1949).

61. *Id.* at 502.

62. Building Service Union v. Gazzam, 339 U.S. 532 (1950); Hughes v. Superior Court, 339 U.S. 460 (1950).

63. P. 278.

unanimous Court in upholding the conviction of a religious speaker for words he had used to denounce a policeman who had ordered him to stop arguing with passersby on the streets of Rochester, New Hampshire, on a busy Saturday afternoon.[64] The speaker had called the policeman a "damned Fascist" and "damned racketeer." Murphy held that such "fighting words" (in this instance inciting a breach of peace by the arresting official) were not covered by the First Amendment's guarantee of freedom of speech and of religion.[65] Holmes, in 1915, upheld the conviction of a man for violating a state statute that forbade speech that tended to encourage or advocate disrespect for law.[66] The defendant had claimed that the statute as applied denied him his freedom of speech as guaranteed by the First Amendment. Holmes held that to forbid speech tending to encourage violation of a valid statute was not prohibited by the Constitution.

Holmes, Brandeis and other Justices have maintained that speech may have the quality of an attempt and an attempt may have the quality of an act—an act of the sort we have the right to prevent; and that probable success of such an attempt through speech is not a necessary criterion in applying the clear and present danger test. Holmes said in the *Schenck* case: "If the act, (speaking, or circulating a paper,) its tendency and intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act of speaking a crime."[67]

Thus, the First Amendment has not been regarded, by either founding fathers or liberal Justices, as a guarantee of unlimited free speech. Rodell, too, inserts a qualification of his own when he says that the First Amendment guarantees freedom of *political* speech.[68] That qualification is certainly a capital Iota, and not one intended by the eighteenth century revolutionaries. In an "Address to the People of Quebec," the Continental Congress of 1774 explained that by "freedom of the press" they meant freedom of speech in advancing "truth, science, morality and arts in general," as well as speech in its "diffusion of liberal sentiment on the administration of Government."[69] There is, moreover, nothing to indicate that the eighteenth century constitution-makers intended to make "political" speech completely free.

Perhaps for the sake of the comfort of an absolute creed, or perhaps to alert the reader to the risk we run in narrowing the scope of free speech, Rodell uses strong language that may not further his cause—language that does not help the reader understand the essential problem of finding some sort of fairly workable line for distinguishing between proper and improper limitations on speech. It is this problem, set in the context of the particular times, that has given rise to the Supreme Court's varying interpretations of

64. Chaplinski v. New Hampshire, 315 U.S. 568 (1942).
65. *Id.* at 572.
66. Fox v. Washington, 236 U.S. 273 (1915).
67. Schenck v. United States, 249 U.S. 47, 52 (1919).
68. P. 22 and *passim.*
69. 1 JOURNALS OF CONG. 58, 61 (1777).

the freedom of speech. The issues here, between author and reviewer, have nothing much to do with conflicting views on the glory of free speech in our society. Rather the issues are: whether Rodell's interpretation of the First Amendment is any more genuinely humane, any more consistently applicable than the Holmes-Brandeis interpretation; whether in the *Dennis* case Douglas did hew straighter than Vinson to the Holmes-Brandeis line; and more generally, whether eloquent eulogies of free speech and "forth-right" denunciations of "senseless fears" are of much help, in applying so generalized a formula as either the clear and present danger test or Rodell's qualified "no-qualification" interpretation.

"Clear and present [or immediate, imminent] danger" is not a precise expression. To define a danger as "present," the posited interval between speech and its sensibly feared consequences may be a matter of seconds—as when a man shouts fire in a theater. But certainly Holmes and the other Justices could not have had any such immediacy in mind when they sent Schenck, Debs, and others to jail for what they had said; and Douglas could not have had such promptness in mind when he listed the sorts of speech he would have no doubts about restraining. It seems sensible to believe that the gravity of a danger, rather than the degree of its imminence, should count most.

The clear and present danger test has its difficulties of application; so would Rodell's formula, if he means what he seems to mean—complete freedom of speech, political or other, no matter how libelous, fraudulent, peace-breaching, crime-inciting, seditious, or security-endangering it may be. If Rodell did not mean to include all such speech in his strong-straight formula, without any iota of qualification, I think he should have specified and explained his rejected qualifications. An "of course" disclaimer here would not be sufficient, after his many sweeping words of praise or denunciation in his comments on the behavior of the several Justices. "There is every reason," said Holmes (discussing our "imperfect social generalizations" in "our system of morality") "for trying to make our desires intelligent."[70] And there is every reason why a Justice of the Supreme Court should make his judicial opinions clear and precise. "The precise problem of the *Dennis* case," a professor of political science has said recently, "is not solved by an appeal to the abstraction 'free speech' any more than the *Adkins* problem was solved by invoking 'liberty of contract.' A Brandeis Brief is as relevant in one case as in the other."[71]

* * *

Since Rodell's book went to press there have been some gains for free speech, fair trials and equal protection of the laws: some of these gains were in decisions by the Supreme Court; others, possibly under the influence of the Court's current attitudes, were in actions by other courts and governmental agencies. The Supreme Court has, in the last year, reversed some convictions for con-

70. Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 2 (1915).
71. Mendelson, *Reply to Professor Beth*, 17 J. POLITICS 286, 290 (1955).

tempt of Congress in refusals to answer questions by committee-investigators, where the committee had not made clear the relevance of its questions in a legitimate investigation, or had not properly informed a witness of his constitutional rights.[72] A federal appellate court has rendered decisions denying the right of the Secretary of State to withhold or withdraw passports on the basis of loyalty or security charges, without according the persons involved a proper hearing.[73] The same court has denied to the government, acting as landlord, the right to evict a tenant on the ground of his alleged membership in a subversive organization without clear proof of his membership in an organization clearly shown to be subversive.[74] A federal grand jury has indicted a private rooming house owner for falsely accusing a White House clerk of being subversive. Some department heads have cancelled guilt-by-association or guilt-by-kinship charges. The Secretary of the Army has taken steps towards ending "defects and abuses" in his department's personnel-security system; and the Attorney General has initiated an inquiry into charges, based on responsible reports, of party officials' interferences with voting by Negroes in a recent primary election in a Southern state.

Obviously, the rightness of any of these actions does not cancel out or mitigate the wrongness of remaining abuses. But the corrections may be significant enough to justify the hopeful final words of Rodell's informative, caustic history of the Supreme Court. He says that "under the inspiration of . . . two great Justices [Douglas and Black] and the aegis of a potentially great Chief Justice [Warren], the American dream of freedom may be reborn."[75]

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72. Quinn v. United States, 349 U.S. 155, 165-77 (1955); Emspack v. United States, 349 U.S. 190, 202 (1955); Bart v. United States, 349 U.S. 219, 221-23 (1955).

73. Dulles v. Nathan, 225 F.2d 29 (D.C. Cir. 1955); *cf.* Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955).

74. Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955).

75. P. 332.

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